

1
2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 Case No. 18-23538-rdd
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8 In the Matter of:
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10 SEARS HOLDINGS CORPORATION, et al.,
11

12 Debtors.
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14 - - - - -x

15
16 United States Bankruptcy Court
17 300 Quarropas Street, Room 248
18 White Plains, New York 10601
19

20 June 27, 2019

21 2:14 PM
22

23 B E F O R E:

24 HON. ROBERT D. DRAIN

25 U.S. BANKRUPTCY JUDGE

1 HEARING Re: Assume/Reject Leases re: Bruce Trust

2
3 HEARING Re: Declaration/Second Declaration of Samuel
4 Levander in Support of Transform Holdco LLCs Reply to
5 the Bruce Trusts (I) Designatable Contract Assumption
6 and Assignment Objection and (II) Reservation of Rights
7 (with Exhibits W and X) (related document(s) 4091,
8 4094, 4028, 3868, 3008, 3421, 2507, 1774, 2881, 4092)

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25 Transcribed by: Lisa Beck

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P R O C E E D I N G S

THE COURT: Please be seated. Okay. Good afternoon. In re Sears Holdings Corp.

MR. BAREFOOT: Good afternoon, Your Honor. Luke Barefoot from Cleary Gottlieb Steen & Hamilton for Transform Holdco and its affiliates for the record.

THE COURT: Good morning (sic).

MR. BAREFOOT: Your Honor, we're here this afternoon on the evidentiary hearing for the dispute between Transform Holdco and the Bruce Trusts concerning the Asheville, North Carolina Kmart.

THE COURT: Right.

MR. BAREFOOT: Before we turn to the merits of that, I just wanted to address a housekeeping matter. Your Honor, we have six orders that we submitted on notice of presentment. The presentment date either passed yesterday or this afternoon. Extending the time under Section 365(d)(4) for six different -- there are six different orders that cover in total seven different leases. With Your Honor's permission, we just propose to submit those to your chambers.

THE COURT: No, that's fine.

MR. BAREFOOT: Your Honor -- and for the merits portion of the hearing, I'm going to turn this over to my colleague, Sam Levander.

1 THE COURT: Okay.

2 MR. LEVANDER: Thank you, Your Honor. Sam
3 Levander on behalf of Transform Holdco LLC.

4 Your Honor, before I begin, I'd just like to
5 confirm that you received the parties' hard copy filings and
6 exhibit binders. There should be one larger binder with 41
7 exhibits --

8 THE COURT: Right.

9 MR. LEVANDER: And then a smaller one with four
10 exhibits.

11 THE COURT: Yes for a total of 45.

12 MR. LEVANDER: Total of 45.

13 THE COURT: Right.

14 MR. LEVANDER: The last document in the larger
15 binder is the deposition transcript of Paul Bruce who is the
16 sole declarant on behalf of the Bruce Trusts.

17 THE COURT: Right.

18 MR. LEVANDER: And the parties have agreed to
19 designate portions of his deposition transcript in lieu of
20 calling for his live testimony today.

21 THE COURT: Okay.

22 MR. LEVANDER: So that means there will be no live
23 cross-examination of any witnesses in connection with this
24 hearing.

25 THE COURT: And those are the portions marked in

1 orange and blue?

2 MR. LEVANDER: And the orange marks are Transform
3 marks.

4 THE COURT: Right.

5 MR. LEVANDER: The blue ones are Bruce Trust
6 marks.

7 THE COURT: Okay. All right.

8 MR. LEVANDER: Okay?

9 THE COURT: All right. So you've agreed -- the
10 parties, that is, have agreed to the admissibility of all 45
11 of these exhibits.

12 MR. GOODMAN: Your Honor, Brett Goodman, Troutman
13 Sanders, on behalf of the Bruce Trusts.

14 Yes. We did agree to the admissibility of the 45
15 exhibits subject to certain documents being held in
16 confidentiality and under seal --

17 THE COURT: Right.

18 MR. GOODMAN: -- which --

19 THE COURT: That's fine. Okay. But they're
20 admitted into the record. They'll be subject to the sealing
21 order.

22 MR. GOODMAN: Okay.

23 MR. LEVANDER: Thank you, Your Honor.

24 THE COURT: Which I'm not sure it's been entered
25 yet. But in any event -- there have been like 10 sealing

1 orders in this case in the last two weeks. So I don't
2 recall if that order's been entered yet. But if it isn't,
3 I'm assuming it will be.

4 MR. GOODMAN: Thank you, Your Honor.

5 MR. LEVANDER: Thank you, Your Honor.

6 (Joint Transform Holdco's and Bruce Trusts' exhibits
7 received in evidence)

8 MR. LEVANDER: So, Your Honor, there's a lot of
9 paper in front of you and there's a long history here. But
10 this is actually a very simple case.

11 Kmart has been the tenant of a lease at 1001
12 Patton Avenue in Asheville, North Carolina continuously
13 since 1964. That lease has been amended and extended but
14 it's never been terminated or subordinated.

15 Now I'd like to just very briefly go through the
16 chronology and just hit on a few key points. So in 1964,
17 the fee owner and Kmart entered into a lease. And then the
18 critical point occurs two years later in 1966. And that's
19 when the fee owner assigns its landlord interest in the
20 Kmart lease to a third party. Then in 1992, the fee owner's
21 assignee as landlord extended the Kmart lease for a term of
22 40 years. The Kmart lease is therefore currently unexpired.

23 Now the objectors argue in the alternative that
24 the Kmart lease either expired in 2001 or that it expired in
25 2019. Both of those arguments fail. If the Kmart lease had

1 expired in 2001, that would lead to the absurd conclusion
2 that Kmart remained a tenant of the Asheville property
3 without any objection for more than 17 years after its lease
4 expired.

5 Now we make a number of arguments in our briefs as
6 to why this argument fails. I just want to highlight two
7 points for you today. First, Paul Bruce, the objectors'
8 sole declarant, admitted in his deposition that the Kmart
9 lease did not expire in 2001 because it was extended by the
10 1992 second amendment. And that's at page 104 of the
11 transcript of his deposition.

12 And then second, if you take a look at the first
13 document in the smaller binder, that's tab 42, the real
14 property purchase agreement, M, between the Bruce Trusts and
15 a redacted purchaser, the objectors again admitted that in
16 March 2018, Kmart was a current tenant and that the Kmart
17 lease had been extended in 1992.

18 A few highlights from that document. In paragraph
19 30(c) on page 8, the Kmart lease is defined as an existing
20 lease. And at the end of that paragraph, you'll see a
21 description of the Kmart lease as extended in its 1992
22 amendment. And then finally, if you turn to Exhibit B on
23 the final page of that document, you will again see a
24 description of the Kmart lease, as amended, by the second
25 and third amendments to the Kmart lease.

1 So that's a concession that Kmart is an existing
2 tenant as of 2018, 17 years after they argue may have
3 expired.

4 Turning to their second argument that the lease
5 expired in 2019, that argument fares no better. The crux of
6 the 2019 argument is that the 1964 Kmart lease was a
7 sublease that was dependent on two overleases, the 1966
8 ground lease and assignment and the 1975 sandwich lease.
9 But both of those supposed overleases explicitly state that
10 they were entered into subject to the prior Kmart lease.

11 Objectors failed to plausibly explain when and how
12 the Kmart lease became subordinated when it turned from a
13 lease into a sublease. And the key documents in this case
14 make it clear that Kmart never became a subtenant.

15 Now, Your Honor, if it would be helpful, I can go
16 through --

17 THE COURT: I guess you also rely on the fact that
18 as part of that 1966 transaction, the Bruces assigned all
19 right and title and interest in the lease to Patent Plaza
20 Associates, PPA.

21 MR. LEVANDER: That's correct. And that
22 provision, 1307 of that contract, couldn't be more clear in
23 terms of making an assignment from the Bruces to PPA.

24 THE COURT: Okay.

25 MR. LEVANDER: So if you have any questions about

1 any of the documents, I'm happy to --

2 THE COURT: So, in sum, you contend that under
3 applicable North Carolina law and the underlying agreements,
4 the store lease, the lease of the -- originally with Kresge,
5 the Kmart lease, does not terminate upon the termination of
6 the ground lease because the ground lease is not a head
7 lease to which the Kmart lease is subject but rather it's
8 the other way around.

9 MR. LEVANDER: That's correct.

10 THE COURT: And when there was an amendment,
11 whenever there was an amendment, by the landlord under the
12 Kmart lease as assignee, that amendment was binding on the
13 owner of the property and the landlord under the ground
14 lease because of the absolute assignment and the fact that
15 the ground lease is subject to the Kmart lease.

16 MR. LEVANDER: That's correct.

17 THE COURT: So I understand all of that other than
18 the ground lease being subject to the Kmart lease. I don't
19 think you're saying that by that anything more than,
20 obviously, while it's in effect, the ground lease is subject
21 to the Kmart lease, right? Because that's all it is. And I
22 believe it expired in 2019. But what you're really saying
23 is that when the parties entered into the assignment of the
24 Kmart lease and the ground lease, they didn't evidence any
25 contrary intention to the fact that that was a complete

1 assignment of the whole title and the lease and not subject
2 to any other reservations. Is that right?

3 MR. LEVANDER: That's correct.

4 THE COURT: Okay. All right. Okay. I think I
5 followed all of that. Now given all of that, you really
6 don't need to get into ratification or agency theory other
7 than, I guess, stating as another way that because of the
8 absolute assignment, the right party to deal with was, in
9 fact, PPA and its assigns.

10 MR. LEVANDER: That's correct. So we --

11 THE COURT: There wasn't -- the ground lessor fee
12 owner was not the right party to deal with after that
13 absolute assignment.

14 MR. LEVANDER: That's correct. Exactly.

15 THE COURT: They could be deemed to be bound by it
16 but the --

17 MR. LEVANDER: Right.

18 THE COURT: -- party who would be the actual agent
19 would be the assignee which originally was Patton Plaza
20 Associates, PPA, and their -- through assignments from it,
21 it became Nineteenth Asheville Corp. and then what the
22 parties refer to as NAP.

23 MR. LEVANDER: That's exactly right.

24 THE COURT: Okay. All right.

25 MR. LEVANDER: And I'm happy to answer any further

1 questions or come back on rebuttal.

2 THE COURT: Okay. All right. Thank you.

3 MR. GOODMAN: Good afternoon, Your Honor. Brett
4 Goodman, Troutman Sanders, for the record, on behalf of the
5 Steven Bruce Revocable Trust, the Cara Bruce Irrevocable
6 Trust and the Allison Bruce Irrevocable Trust, all three
7 trusts being collectively called the Bruce Trusts for the
8 purposes of this hearing and the papers. And I just want to
9 also point out that we have Mr. Paul Bruce here in the
10 courtroom. He traveled up today for the hearing. Mr. Bruce
11 is the declarant and the custodian of record for the trust.

12 THE COURT: Right. But since all the exhibits are
13 admitted and his deposition portions have been denominated,
14 he doesn't need to testify.

15 MR. GOODMAN: Understood, Your Honor.

16 THE COURT: Okay.

17 MR. GOODMAN: Your Honor, I actually just want to
18 deal myself with the burden of proof argument that was
19 raised in the papers and then I'll probably hand off the
20 rest of the argument.

21 Your Honor, Transform's argument in its reply with
22 respect to the burden of proof is simply wrong. In their
23 brief, Transform relies on a series of inapplicable cases
24 that address only whether the agreements at issue constitute
25 a true lease or a disguised security agreement under the

1 UCC. And in those cases, the law is such that the parties
2 seeking to characterize the agreement as something other
3 than it purports to be has the burden.

4 Here, however, Your Honor, there's no dispute
5 among the parties that the Kmart lease is a true lease.
6 Rather, the only question is whether that lease has expired.

7 THE COURT: Well, but doesn't that depend on the
8 characterization of it as a lease or a sublease? I mean,
9 there is a characterization element to this.

10 MR. GOODMAN: Well --

11 THE COURT: I mean, put it differently, this --

12 MR. GOODMAN: -- it's a 36 -- I think from our
13 standpoint, regardless, it's a 365 issue and they are the
14 movant and therefore they have the burden of proof.

15 THE COURT: 'Cause it says assign a lease. The
16 statute says assign a lease.

17 MR. GOODMAN: And they purport for it to be a
18 lease --

19 THE COURT: Right.

20 MR. GOODMAN: -- the Kmart lease. So --

21 THE COURT: But you know what? I don't think it
22 really matters here because this is, to my mind, having gone
23 through all of the pleadings -- I mean, I understand your
24 arguments but I don't think it matters because going through
25 the pleadings, this isn't an issue where the burden of proof

1 is really that important based on, I think, the documents
2 and the law.

3 MR. GOODMAN: That's fair, Your Honor. And I
4 don't need to belabor the point. I guess, the balance of
5 our arguments and our objections relate to the
6 interpretation of the lease documents and the transaction
7 under applicable North Carolina law.

8 THE COURT: Right.

9 MR. GOODMAN: And my colleague, Amy Williams, who
10 has been admitted pro hac and is a partner in our Charlotte
11 office, will be addressing that. So I'll hand off the
12 balance of the argument so as not to belabor the burden
13 point.

14 THE COURT: Okay.

15 MR. GOODMAN: Thank you, Your Honor.

16 MS. WILLIAMS: So, Your Honor, well, I --

17 THE COURT: You can stay there, if you want. If
18 you're more comfortable there, that's fine.

19 MS. WILLIAMS: Well, no. I can --

20 THE COURT: It's up to you.

21 MS. WILLIAMS: My voice does not carry that far,
22 Your Honor.

23 THE COURT: Well, there's a microphone there, too.
24 But --

25 MS. WILLIAMS: Well, that's true.

1 THE COURT: But hopefully, the podium will hold
2 your notebook. Okay.

3 MS. WILLIAMS: We'll come here. Thank you, Your
4 Honor. First of all, just to introduce myself to the Court,
5 I'm Amy Pritchard Williams, a member of the North Carolina
6 bar. And I appreciate the opportunity to appear this
7 morning on behalf of the Bruce Trusts.

8 THE COURT: Okay. Good afternoon.

9 MS. WILLIAMS: Or this afternoon. Thank you.

10 I am going to focus on the legal argument, Your
11 Honor, because I do think there's an important aspect of
12 North Carolina law, especially North Carolina law in the
13 1960s when the ground lease was executed that we want to
14 draw to the Court's attention.

15 I will make just a couple of points in response to
16 the -- a couple of fact points that Mr. Levander made. If
17 you look at the document that's under seal, Your Honor, in
18 Joint Exhibit 42, both paragraphs 30(c) and 30(d) contain an
19 express sentence. And I'll just read one into the record.
20 That's the paragraph that's dealing with various property
21 leases, Your Honor. And the very last sentence reads:
22 "Further, nothing in this paragraph shall be construed as an
23 admission or representation by Sellers that any of the
24 existing leases legally continue after the termination of
25 the current lease" -- which I believe is referring to the

1 ground lease. And it goes on to essentially reiterate that
2 the sellers are of the view that these leases could all
3 terminate in 2019 when the ground lease terminates.

4 So just to make the point that this contract isn't
5 any sort of admission on the part --

6 THE COURT: Right.

7 MS. WILLIAMS: -- of my clients.

8 THE COURT: Well, I think it -- I think it may be
9 an admission that the lease didn't terminate in 2001. I
10 think it centers on what I think is the main argument here
11 which is upon the ground lease's termination --

12 MS. WILLIAMS: Right.

13 THE COURT: -- does the lease terminate.

14 MS. WILLIAMS: Your Honor, the --

15 THE COURT: Does the Kmart lease also terminate.

16 MS. WILLIAMS: Right. And if I could, my short
17 answer to that -- but I'd like to give the Court a longer
18 one --

19 THE COURT: Okay.

20 MS. WILLIAMS: -- that will talk about North
21 Carolina law. My short --

22 THE COURT: That's fine.

23 MS. WILLIAMS: My short answer to that question
24 is, I think, at the latest, the original '64 lease expired
25 by its terms in '01. There is the '92 amendment which we

1 view as an agreement between NAP and Kmart that allowed
2 Kmart to have possession of the property. And it may not be
3 called a sublease but when you enter into a lease with a
4 subtenant for the property -- and we'll talk about what
5 NAP's -- the limits on NAP's authority was. That's
6 effectively a sublease.

7 So there's nothing -- in terms of dealing both
8 with all of those alternative theories posited that's sort
9 of the question of, well, Kmart's been there forever, all of
10 that is perfectly consistent with --

11 THE COURT: With a long-term sublease.

12 MS. WILLIAMS: -- with a long-term sublease --

13 THE COURT: Right.

14 MS. WILLIAMS: -- that expired when the landlord
15 under that sublease lost its right of possession which, I
16 think, everyone agrees, it's undisputed, was in 2019.

17 But what I'd like to do, Your Honor, is take the
18 Court back to 1966 when the ground lease was drafted and
19 executed because I think it's important to recognize what
20 the state of law looked like in North Carolina when it comes
21 to real property conveyances. And it's important to
22 recognize that this was, in fact, a ground lease.
23 Transform, in its papers, tries to call a ground lease an
24 assignment because they want to point to the assignment.
25 The parties to this transaction and their successors never

1 called it that. They called it an indenture lease. And the
2 reason that that's important is that prior to January 1st,
3 1968, in North Carolina, Courts placed principal importance
4 on any kind of contract conveying real property on the
5 granting and the have and to hold clauses.

6 We talk about this in our papers -- and I'll cite
7 to the Court the 1980 Whetsell v. Johnson -- sorry --
8 Jernigan decision primarily because it has an excellent
9 history of the case law on this issue. But it sets out very
10 clearly that prior to a statute being enacted, effective
11 1/1/68, if there was any sort of incongruity or disagreement
12 or contradiction between the granting and the have and to
13 hold clauses and the rest of the conveyance, those two
14 clauses controlled to the point at which there are several
15 cases where the granting clause looks like a fee simple.
16 Later in the deed, it's very clear that the grantor meant to
17 convey only a life estate and the Court rules that it's a
18 fee simple conveyance. And this -- the 1948 Artis decision
19 does the same thing.

20 The North Carolina legislature when they enacted -
21 - they enacted the statute to change the rule. But the
22 statute is expressly prospective and that's actually the
23 holding of Whetsell. In 1/1/68, the legislature enacted a
24 statute that says a Court shall determine the effect of the
25 instrument on the basis of the intent of the parties as it

1 appears from all of the provisions of the instrument.

2 But in 1966, when these parties were preparing
3 this ground lease, it would have been clear to all of them
4 that that's what this was, a grant of the premises for a
5 term of years and no longer. So the assignment in Article
6 13 has to be read in conjunction with the limits on what the
7 overall instrument was conveying. And the overall
8 instrument did not convey the ability for the ground lessor
9 to bind the fee simple owner to a term that went beyond that
10 of the ground tenant.

11 THE COURT: Well, it doesn't say that, though,
12 right? And it is an absolute assignment of the lease.

13 MS. WILLIAMS: Well, I --

14 THE COURT: Isn't it? I mean, it does assign -- I
15 mean, the parties did assign the Kmart lease.

16 MS. WILLIAMS: For the term of the ground lease
17 only --

18 THE COURT: It doesn't say --

19 MS. WILLIAMS: -- Your Honor.

20 THE COURT: -- that.

21 MS. WILLIAMS: If you look at Article 13 as a
22 whole, and this is one subsection of one article -- and
23 again, I -- Transform wants to read certain subsections and
24 forget about others.

25 THE COURT: Right.

1 MS. WILLIAMS: But if the Court has Joint Exhibit
2 5, I believe --

3 (Pause)

4 THE COURT: Okay.

5 MS. WILLIAMS: So, Your Honor, if you look at
6 Article 13 as a whole --

7 THE COURT: Right.

8 MS. WILLIAMS: -- first of all, it's called
9 "Assignment, Subletting and Mortgaging". So it's covering
10 what I would argue are pieces of one aspect of the
11 conveyance -- the rights of the ground tenant under the
12 ground lease.

13 If you look at all of these sections together, the
14 first Article 13.01 makes it clear that if there's going to
15 be a sublet of all of the lease or the leasehold, the
16 tenant, in doing so, cannot encumber the landlord's title to
17 the demised premises. So there's a limit there on the
18 ability of the tenant to encumber the landlord's title.

19 13.0 --

20 THE COURT: Can I interrupt you?

21 MS. WILLIAMS: Sure.

22 THE COURT: The Kmart lease already happened that
23 precedes this agreement. Kmart's not a party to this
24 agreement.

25 MS. WILLIAMS: Right, Your Honor. But the '92

1 amendment does not.

2 THE COURT: But --

3 MS. WILLIAMS: The power, the ability --

4 THE COURT: I understand. But I think that the
5 language you're referring to is referring to new leases or
6 subleases.

7 MS. WILLIAMS: And any transfers of this lease.

8 If --

9 THE COURT: Well, that's right. This lease,
10 meaning the ground lease.

11 MS. WILLIAMS: Right, Your Honor. And what I'm
12 attempting -- let me back up and just give a preview of
13 where I'm going with this.

14 THE COURT: Okay.

15 MS. WILLIAMS: What I'm trying to show the Court
16 is that the subsections of Article 13 each cover a different
17 aspect of what the ground tenant is allowed to do with its
18 leasehold. And what they consistently have in common with
19 one another is they prohibit an encumbrance on the property
20 without the consent of the fee owner for a period of longer
21 than 10 years or, in the case of 13.01, certainly longer
22 than the ground lease itself because you're not allowed to
23 encumber the fee. And what Transform is arguing is that
24 without -- despite the fact that this is a ground lease for
25 a term of years and despite the then North Carolina law, the

1 folks who wrote this, would have understood that there is an
2 exception to every kind of ability or, in fact, inability to
3 encumber the fee that solely applies to the Kmart lease.

4 And the parties never say that.

5 THE COURT: Well, they do say in 13.07 that
6 they're referring to the existing leases.

7 MS. WILLIAMS: Well, I mean, that's right, Your
8 Honor. But again, we would argue that 13.07 has to be read
9 really in deference to the term of years.

10 But if I can turn to --

11 THE COURT: It would be the 99-year term of the
12 ground lease?

13 MS. WILLIAMS: Well, if at all -- if all of the
14 extensions had been granted, yes. But they -- if all the
15 extensions had been authorized, yes. But they weren't. So
16 it's to have and to hold for as long as this ground lease is
17 in place. And then this ground lease goes away at the end
18 of January 2019.

19 I do want to talk, Your Honor, about --

20 THE COURT: Well, I guess I'm having -- I'm having
21 a hard time seeing that. I mean, 13.07 is pretty specific.
22 It doesn't have a carveout for anything else. And this
23 agreement follows the prior agreement which is wholly
24 assigned by the parties to this agreement to the Kmart
25 landlord. So, I mean, --

1 MS. WILLIAMS: And --

2 THE COURT: Can you address the cases dealing with
3 complete assignments of the leases and other executory
4 contracts that the buyer has cited here, like Northside
5 Station --

6 MS. WILLIAMS: Well, Your Honor, the principal -

7 THE COURT: -- et cetera?

8 MS. WILLIAMS: -- way in which I distinguish those
9 cases is that they weren't written in 1966 in North
10 Carolina.

11 THE COURT: Well, they go back to case law from
12 1909. So I'm not sure that really helps me.

13 MS. WILLIAMS: Well, I -- I mean, in --

14 THE COURT: I mean --

15 MS. WILLIAMS: I don't know that --

16 THE COURT: -- albeit that was not a lease but it
17 deals with the assignment of a contract.

18 MS. WILLIAMS: Right.

19 THE COURT: And --

20 MS. WILLIAMS: And the difference here is the real
21 property aspect of this, Your Honor.

22 THE COURT: Well --

23 MS. WILLIAMS: I mean, it --

24 THE COURT: -- the same principle really should
25 apply. I mean, how can two parties deprive a third party

1 that has full rights under a contract of those rights by
2 selling off the fee title? And at the same time, the
3 parties provide for absolute assignment of the first
4 contract. So it's still there. It's just -- it seems to be
5 contrary to these cases. I mean, I agree with your
6 underlying premise. And in fact, there's a good reference
7 to it in Neal v. Craig Brown, Inc. --

8 MS. WILLIAMS: Yes.

9 THE COURT: -- where the Court says if it's not a
10 full assignment and it's just a sublease then termination of
11 the original lease terminates any dependent sublease. This
12 is true notwithstanding the fact that the sublease contains
13 options to renew. And I think that's what you're arguing
14 here is that the options to renew are in a sublease. But
15 it's pretty clear to me that this Kmart lease never was a
16 sublease. And the parties didn't make it a sublease when
17 the owner sold its fee interest but got a complete
18 assignment of the lease. There's no remaining tenancy.
19 It's a total complete assignment. So it seems like, under
20 these cases, this is not the Neal v. Craig Brown situation
21 but rather you could, I guess, phrase it one of two ways.
22 Either Kmart can enforce its -- now Sears can enforce its
23 rights through NAP to the Bruce Trusts or NAP, having been
24 made by the 1966 agreements because the lease refers to
25 being effective on assignees -- the Kmart lease, that is --

1 the full assignee of the agreement is the agent for the
2 Bruce Trusts. So the Bruce Trusts, in essence, are
3 breaching the agreement by saying you can't actually extend.

4 MS. WILLIAMS: Your Honor, could I hand up -- we
5 attached this to our papers but it's a flow chart. And I
6 just want to make sure that we're on the same page. NAP was
7 not a tenant under the ground lease at the time of the '92
8 amendment.

9 THE COURT: I know.

10 MS. WILLIAMS: Okay. It --

11 THE COURT: You have the whole -- I understand.

12 You have this --

13 MS. WILLIAMS: It was a --

14 THE COURT: -- sandwich lease in between.

15 MS. WILLIAMS: It was a --

16 THE COURT: But that's just adding more --

17 MS. WILLIAMS: But --

18 THE COURT: You still have the actual lease, the
19 Kmart lease, which never, to me, was a sublease.

20 MS. WILLIAMS: And if I could address -- if I
21 could just to an argument that, again, is addressing whether
22 or not NAP had the power to do what it did under the ground
23 lease -- and I do want to talk to the Court about 13.03 --

24 THE COURT: Okay.

25 MS. WILLIAMS: -- and the fact that throughout

1 this ground lease, again -- and I would cite the Walmart
2 cases that are in our papers for this proposition that one
3 should read contracts if we're talking about contracts, in a
4 way that makes sense and read them as a whole.

5 In 13 -- Transform makes the argument that the
6 parties to the ground lease were distinguishing carefully
7 between what is a lease and what is a sublease. And the
8 words of this ground lease just don't stand up to that, Your
9 Honor. 13.03 says that you can sublet to an occupying
10 subtenant without the written consent of the landlord if
11 three conditions are followed. But the middle of those
12 three conditions is that the term of said lease, which is
13 also capitalized for reasons that are not clear, can't be
14 more than 10 years.

15 THE COURT: Wouldn't this have to -- if -- to
16 follow your interpretation of this, wouldn't it have to say
17 "Tenant may continue subletting" as opposed to "sublet"? I
18 mean, doesn't this really apply to new leases --

19 MS. WILLIAMS: No, Your Honor.

20 THE COURT: -- i.e., new subleases?

21 MS. WILLIAMS: That's my point, is that the -- in
22 this document, in the ground lease, there are a number of
23 places where if you read --

24 THE COURT: Well, I'm just focusing on the first
25 law which is --

1 MS. WILLIAMS: Right.

2 THE COURT: -- 13.03.

3 MS. WILLIAMS: So -- but my point is, is that this
4 was not intended by the parties -- the word "subtenant" was
5 not intended to exclude Kmart.

6 THE COURT: Well --

7 MS. WILLIAMS: And the reason that I say that is
8 that there are plenty of other places in --

9 THE COURT: Well, let's go through.

10 MS. WILLIAMS: -- the lease.

11 THE COURT: I --

12 MS. WILLIAMS: Sure.

13 THE COURT: So far I don't see it in 13.03 but we
14 should go --

15 MS. WILLIAMS: All right.

16 THE COURT: -- through the other ones to --

17 MS. WILLIAMS: So I've made my point about 13.03.

18 THE COURT: Right.

19 MS. WILLIAMS: In 13.10, if we are distinguishing
20 between subleases and leases, the language in 13.10 relating
21 to a future occupancy lease doesn't make any sense because
22 there wouldn't be an -- because to the Court's point, any
23 lease entered into in the future is going to be a sublease.

24 THE COURT: Okay. Let's just walk through --
25 13.10, right?

1 MS. WILLIAMS: 13.10. And my point is that it's
2 referring to -- bear with me. If you look at the top of
3 page 13(g), this is the provision that puts limits on the
4 ability to enter into agreements that would affect -- and
5 then it says "any present or future occupancy lease which
6 would reduce the rent or shorten the term".

7 THE COURT: Okay.

8 MS. WILLIAMS: Transform focuses on the second
9 half of that sentence. I'm focusing on the fact that
10 they're talking about future occupancy leases which, if we
11 follow the Transform construction of this document, there
12 wouldn't be any leases in the technical sense; there would
13 be subleases.

14 THE COURT: Oh. You mean, because they say future
15 -- well, but this is consistent with 13.07. I mean, the
16 deal here, I believe, that's consistent with the absolute
17 assignment is that the ground tenant who's also assigned the
18 Kmart lease isn't going to -- sorry. It's not 13.07. 13 --
19 no. I mean, this hasn't happened as far as this debtor --

20 MS. WILLIAMS: But --

21 THE COURT: -- this tenant is concerned. It
22 didn't reduce the rent. It didn't reduce the terms.

23 MS. WILLIAMS: But I'm making --

24 THE COURT: It actually increased the rent and
25 increased the terms.

1 MS. WILLIAMS: I'm making a different point, Your
2 Honor --

3 THE COURT: No, I understand.

4 MS. WILLIAMS: -- which is --

5 THE COURT: -- but it's --

6 MS. WILLIAMS: -- the way that we're talking about
7 language. The way that --

8 THE COURT: I know. It says leases.

9 MS. WILLIAMS: -- parties to the lease talk about
10 language --

11 THE COURT: But that --

12 MS. WILLIAMS: -- use language --

13 THE COURT: But this would apply. This would
14 apply because, as a lease, it's perfectly understandable
15 that you wouldn't want the Kmart lease to have a lower rent
16 or a shorter term.

17 MS. WILLIAMS: Right. But my point, Your Honor,
18 is that if Transform's reading of the language is correct
19 then this should read "any present occupancy lease or future
20 occupancy sublease". And the parties just weren't that --

21 THE COURT: No. You could -- this would --

22 MS. WILLIAMS: They just didn't do that.

23 THE COURT: -- apply to both. You could use the
24 word "lease" here to apply to both --

25 MS. WILLIAMS: And --

1 THE COURT: -- either type of lease.

2 MS. WILLIAMS: And you could use the word

3 "sublease" before to also apply to Kmart --

4 THE COURT: No. But they --

5 MS. WILLIAMS: -- because they were functionally
6 thinking about --

7 THE COURT: But I actually think this actually
8 makes it -- I think, to me, this makes Transforms' point.
9 If you do a Venn diagram, "sublease" means sublease.
10 "Lease" covers both. And this logically does cover both
11 because it makes sense that the ground tenant wouldn't
12 reduce the term or the lease rental amount of the assigned
13 Kmart lease. And "lease" covers both. So this one doesn't
14 -- I mean, but we should keep going.

15 MS. WILLIAMS: Yes. If we look at 13.12 --

16 THE COURT: Okay.

17 MS. WILLIAMS: -- which is on page 13(h) --

18 THE COURT: Right.

19 MS. WILLIAMS: -- again, this is a provision that
20 if you take the words "sublease" and "lease" literally, it
21 makes no sense. There weren't any -- if we're going to use
22 Transform's construction and the Court's construction of the
23 ground lease, there were no subleases then as of the time of
24 the execution of the ground lease.

25 THE COURT: Right.

1 MS. WILLIAMS: Only the Kmart lease was in effect.

2 THE COURT: Right. Is there --

3 MS. WILLIAMS: And so, why is there a provision,
4 particularly at a time, frankly, Your Honor, when leases are
5 typewritten, why did they add a provision about "The
6 landlord has not received any securities under any sublease
7 in effect of the date hereof"?

8 THE COURT: Is there a representation of warranty
9 in here that there are no subleases in effect?

10 MS. WILLIAMS: I'm not familiar that there are,
11 Your Honor.

12 THE COURT: I don't think there is.

13 MS. WILLIAMS: I get to --

14 THE COURT: I mean, to me -- I mean --

15 MS. WILLIAMS: I get to there being no subleases.
16 The parties knew that Kmart was the only --

17 THE COURT: Well, did they? I mean, how did they
18 know?

19 MS. WILLIAMS: Well, I'll --

20 THE COURT: I mean, you can easily just have an
21 arrangement with someone. So, to me, this could be --

22 MS. WILLIAMS: But --

23 THE COURT: -- clearly read as, all right, you
24 don't have any securities with any subtenants --

25 MS. WILLIAMS: But --

1 THE COURT: -- because we don't have any
2 subtenants.

3 MS. WILLIAMS: Well --

4 THE COURT: They could -- if they were worried
5 about Kmart, they could say we don't have any securities
6 under the Kmart lease.

7 MS. WILLIAMS: And my argument is, is that they
8 were doing that in Section 13.12.

9 THE COURT: All right. But I think you could just
10 as easily read it to say that --

11 MS. WILLIAMS: The --

12 THE COURT: -- there aren't any subleases --

13 MS. WILLIAMS: Just to make --

14 THE COURT: -- at least where there's securities.
15 Whether -- I guess what this means is a security deposit,
16 right?

17 MS. WILLIAMS: Right. And just -

18 THE COURT: Okay.

19 MS. WILLIAMS: -- to make the evidentiary point,
20 Your Honor, and talk about the history of the building, in
21 '66, there was a single building on the premises that was
22 the Kmart building.

23 THE COURT: Right.

24 MS. WILLIAMS: Joint Exhibit 12, which is an
25 assignment, shows that the Eckerd lease dates from May of

1 '66 which is the next lease that was put into place. And
2 Joint Exhibit 7 shows that in 1969, the only two occupants
3 of the premises were Kmart and Eckerd.

4 THE COURT: Well, what about -- I mean, look, I
5 don't think this is particularly relevant. But it's a big
6 store. At least in the modern era, big department stores
7 sometimes have a section that is the, I don't know, the
8 jewelry section that may be run by someone else.
9 Conceivably, that's a sublease? I don't know.

10 This just -- it doesn't strike me that this type
11 of provision overrides 13.07 and 13.10. It just -- you
12 know, I don't think it -- the rule is that a complete
13 assignment means it's not a sublease unless the parties
14 indicate some limitations to the contrary. So I think you
15 need to show me indications to the contrary. And these
16 provisions really don't do it to me.

17 MS. WILLIAMS: The last one I'll mention, Your
18 Honor, and then I'll move on, is 18.09 which relates to
19 reports that the fee owner was entitled to get concerning
20 the operation of the shopping center.

21 THE COURT: Right. 18.09, you say?

22 MS. WILLIAMS: Yeah. I'm sorry.

23 THE COURT: Okay.

24 MS. WILLIAMS: Yeah. 18.09.

25 THE COURT: Right.

1 MS. WILLIAMS: And I just want to make one point
2 and then I'm going to move on to the sandwich lease.

3 This is an early -- I would call it an early
4 version of what we would now think of as a pretty standard
5 provision. The fee owner was not involved in the operation
6 of the shopping center, right, but the fee owner needs to
7 get information and if the fee owner had a mortgage, would
8 want their mortgage holder to get information.

9 About not just the name of the subtenant but also
10 the conditions of their respective tenancies -- and I
11 believe that there's testimony in Mr. Bruce's declaration to
12 the effect that he did communicate to understand who the
13 tenants were and what rent was being paid. The way this is
14 written, name of any subtenants with the terms and
15 conditions of their tenancies, it doesn't include the Kmart
16 lease under this reading. And where the Kmart is the anchor
17 tenant occupying even after the extensions were built, you
18 know, 80 percent of the occupiable space, why would the fee
19 -- if there's this technical reading of what is a subtenant
20 and what is a tenant, why would the fee owner exclude the
21 anchor from the ability to get information?

22 This is -- again, it's just one of a number of
23 instances where we contend that the language of the lease
24 and the language that the parties are using in the lease was
25 not --

1 THE COURT: I'm sorry. You're saying why would
2 there -- why would the landlord exclude?

3 MS. WILLIAMS: Yeah. Why would the landlord
4 exclude the anchor tenant from its ability, its guaranteed
5 right to get information unless -- so what I am arguing
6 based on that is that the word "subtenant", the parties
7 meant to include Kmart in that.

8 (Pause)

9 THE COURT: And you're saying that this paragraph,
10 18.09, excludes Kmart?

11 MS. WILLIAMS: If you follow the reading -- if you
12 follow the language being used by Transform, yes, because it
13 says "subtenant". And Transform's argument is that Kmart is
14 a tenant --

15 THE COURT: Right.

16 MS. WILLIAMS: -- and not a subtenant.

17 THE COURT: Right.

18 MS. WILLIAMS: So if "subtenant" really does mean
19 only subtenant and "tenant" really only means tenant then
20 this says that the fee owner is entitled to get detailed
21 information about the income and expenses relating to the
22 operation of the demised premises, the names and conditions
23 of the subtenants' tenancies but apparently is not entitled
24 to get information about the Kmart tenant.

25 THE COURT: Well, this provision doesn't carve out

1 Kmart, right?

2 MS. WILLIAMS: My -- I think I'm speaking past the
3 Court.

4 THE COURT: Are you --

5 MS. WILLIAMS: My point is --

6 THE COURT: Are you saying that logically, because
7 Kmart was so important to this real estate venture, this
8 would have to have included Kmart?

9 MS. WILLIAMS: Yes. The word "subtenant" must
10 also be referring to Kmart.

11 THE COURT: Well --

12 MS. WILLIAMS: And it's consis --

13 THE COURT: -- other than the fact that it
14 doesn't. I mean, is there any evidence that these reports
15 were actually demanded and provided?

16 MS. WILLIAMS: I believe that Mr. Bruce references
17 that in his declaration, Your Honor, which is docket 4091.

18 THE COURT: Are there any records that have
19 certified true and correct copies and the like?

20 MS. WILLIAMS: I'm not sure that -- I don't think
21 that we have records of the certified true and correct, Your
22 Honor. But we do have Mr. Bruce from the time that he took
23 over from the fee owner's perspective managing the property
24 and his communications with the agent for NAC or perhaps it
25 was NAP. And I suppose, Your Honor, this does go back to

1 the arguments about burden of proof.

2 THE COURT: Does he say that he received these?

3 MS. WILLIAMS: He doesn't say that he received the
4 certified statements, Your Honor. He said that he would --
5 it was more informal than that. He would call and get
6 information.

7 THE COURT: Okay. All right.

8 MS. WILLIAMS: But regardless of whether he was
9 getting that, regardless of how that was working, my point
10 is that is one of simple logic. If everyone was being very
11 careful not to call Kmart a subtenant, this provision
12 doesn't make any sense.

13 THE COURT: Well, unless you had tenants that came
14 in. I mean, there's no assurance or subtenants that Kmart
15 was going to be there forever. It's a big place. And as we
16 know, Kmart, at times, wanted to sublease its stores or
17 portions of the stores. I mean, there's -- you're going --
18 I mean, it's from 2008 so it wasn't back in 1966. But this
19 was a long-term ground lease. Kmart v. Guastello.

20 I mean, again, this is the -- I understand the
21 logic you're talking about. But this provision is also
22 completely consistent with the logic that for a subtenant in
23 the future, we want to know who they are. We know who Kmart
24 is. We want to know who these other people are because
25 there was a right to sublease. But we want to know how

1 they're doing.

2 MS. WILLIAMS: Well --

3 THE COURT: You know, Joe's Carpet Cleaner,
4 whoever.

5 MS. WILLIAMS: Right. And my point is, I think it
6 would be a whole lot more important to know what the anchor
7 tenant is doing, that they're paying the rent on time. Then
8 it would -- Joe's Carpet Cleaning.

9 But I'll move on to the --

10 THE COURT: Okay.

11 MS. WILLIAMS: -- sandwich lease, Your Honor.

12 THE COURT: All right. I mean, it would be a lot
13 easier to say we want to know what Kmart's doing.

14 MS. WILLIAMS: Well, and my point is that by using
15 the word "subtenant", I think that's what the parties meant
16 to do.

17 The sandwich lease, Your Honor, Transform has
18 skipped over the sandwich lease. But we do think that it's
19 important and that we make this point.

20 In 1992, the tenant under the ground lease was
21 Asheville KM. It was not NAC or NAP or any of the Samuels
22 entities. Instead, Asheville KM was the ground lease tenant
23 and the sandwich lease landlord. And that lease does a
24 couple of things. First of all, it very clearly refers to
25 Kmart as a sublease. It defines it as a sublease in Article

1 1.2 and Schedule 1.2(b). It does not distinguish between
2 the two. And in Article 7, Asheville KM expressly prohibits
3 its tenant from subletting unless it follows certain
4 conditions. And it says specifically "Tenants shall not
5 modify, alter or amend" and some other words "terminate any
6 sublease now or hereafter existing." And we can argue over
7 whether "sublease" meant was -- included the Kmart lease and
8 the ground lease but there's really no argument that the
9 parties didn't specifically identify Kmart as a sublease in
10 this contract.

11 THE COURT: Although again, the North Carolina
12 courts have said that whether the parties define an
13 agreement as a sublease or not it's irrelevant if there's
14 been a complete assignment.

15 MS. WILLIAMS: But here, Your Honor, if one
16 follows the -- well, first of all, the point is that NAP was
17 required to follow the terms of the sandwich lease if it was
18 going to amend the Kmart lease. Okay. Can we -- I mean, I
19 think we can agree on that.

20 THE COURT: But if the --

21 MS. WILLIAMS: I mean, NA --

22 THE COURT: If the Kmart lease was absolutely
23 assigned, as I believe it was in 1966, then all of the
24 assignees of the ground lease from that assignor are subject
25 to that same body of law, aren't they? How can they change

1 the rules just between themselves?

2 MS. WILLIAMS: Well, they can change the rules to
3 limit the rules between themselves. So let me explain, Your
4 Honor. That's why the flow chart, I think, is helpful.

5 In 1992, Asheville KM was the ground lease tenant.
6 So they are the assignee of the Kmart lease. They then
7 sublet to NAC which apparently later becomes NAP. And when
8 Asheville does that, Asheville says to NAP, okay, NAP -- in
9 the sandwich lease -- you run the property. But if you're
10 going to modify any lease, we have to consent. And I would
11 again argue the reason that Asheville KM did that is because
12 Asheville KM wanted to make sure that any modification
13 entered into by NAP complied with Asheville KM's obligations
14 under the ground lease.

15 So Asheville KM has obligations of the ground
16 tenant. They enter into the sandwich lease with the NAC
17 entity. And they say to the NAC entity very clearly -- and
18 I just don't think there's any dispute about this -- you
19 can't modify or amend or do anything to a sublease, which as
20 defined in that lease includes Kmart, without our consent.
21 And I would then posit the reason that they did that is
22 because Asheville KM had obligations as the ground tenant.
23 But regardless, they did it.

24 THE COURT: But wasn't the --

25 MS. WILLIAMS: And regard --

1 THE COURT: I'm sorry. But wasn't the assignment
2 of the Kmart lease still absolute?

3 MS. WILLIAMS: Well, no, Your Honor. The
4 assignment of the Kmart lease took place first pursuant to
5 the ground lease and then pursuant to the sandwich lease.
6 So NAP can't ignore the terms of the sandwich lease and do
7 whatever it likes. It's only --

8 THE COURT: But it wasn't -- but I'm going back to
9 isn't it still an absolute assignment? There was no partial
10 assignments of the Kmart lease, right? There couldn't be, I
11 don't think.

12 MS. WILLIAMS: Well, again, I'm -- my argument
13 goes back to what does the ground lease really mean. But --

14 THE COURT: Right.

15 MS. WILLIAMS: -- I also think that whatever the
16 ground lease assignment says, NAP is not acting pursuant to
17 the ground lease. They're acting pursuant -- their only
18 interest in the property is the sandwich lease. If there
19 were no sandwich lease in 1992, the NAC and NAP entities are
20 not in this chain of title. They're out of it. It's
21 Asheville KM is the ground tenant. So why is it that NAP
22 can enter into an agreement that violates their own lease,
23 their only hold on the property, and yet still bind the fee
24 owner? And not only that, but bind the fee owner to
25 something that apparently is going to go beyond the term of

1 the ground lease.

2 And that -- Your Honor, I have a real problem with
3 the idea that a subtenant under the sandwich lease can
4 ignore the sandwich lease, do whatever it likes with Kmart.
5 There is no evidence, burden of proof or no burden of proof.
6 There's absolutely no evidence that Asheville KM consented
7 to this. And I think that's undisputed.

8 THE COURT: As the tenant under the ground lease.

9 MS. WILLIAMS: And the landlord under the sandwich
10 lease, yes. Both. Asheville KM is the landlord under the -
11 -

12 THE COURT: All right. But I'm focusing -- the
13 landlord with Kmart or as a subtenant?

14 MS. WILLIAMS: I was referring to --

15 THE COURT: Who has the assignment of the Kmart
16 lease at this time in March 1992?

17 MS. WILLIAMS: Asheville KM has conveyed it to NAC
18 as part of the sandwich lease in conjunction with -- I was
19 done on the same day as the sandwich lease. And the
20 sandwich lease, again, places restrictions on what NAP can
21 do. And NAP's only relationship to this piece of property
22 is that it is a subtenant under the sandwich lease. Without
23 the sandwich lease, NAP has no leasehold interest in the
24 property whatsoever.

25 So our argument is NAP had to follow the sandwich

1 lease if it was going to amend the Kmart lease and it
2 didn't. And so the arrangement between NAP and Kmart works
3 between the two of them. But it can't bind the fee owner
4 and encumber the fee owner's interest in the property beyond
5 the time that NAP has any interest in the property. And
6 again, it's undisputed that at the end of January of 2019,
7 when the ground lease expired, so did the sandwich lease.
8 The sandwich lease and the ground lease were designed to run
9 coequally with -- run during the same period of time with
10 one another.

11 So Transform has not made an argument and I do not
12 understand how a subtenant -- an entity whose interest is
13 through this sandwich lease -- that's their interest in the
14 property. Why don't they have to follow that lease if
15 they're amending or modifying the Kmart lease when the Kmart
16 lease is clearly reflected, clearly called a sublease --

17 THE COURT: Well, that part I don't --

18 MS. WILLIAMS: -- in Schedule 1.2.

19 THE COURT: -- buy. I guess, what is your
20 response to that point?

21 MR. LEVANDER: To be described as a sublease?

22 THE COURT: No. No. Not that point. But the
23 fact that the party to -- the landlord party to the second
24 amendment to the Kmart lease does not have title as landlord
25 to that lease based on an absolute assignment.

1 MR. LEVANDER: So I guess I would --

2 THE COURT: You need to just stand up when you --

3 MR. LEVANDER: Sure.

4 I would turn the Court's attention first to tab 16
5 of the binder which this is just a description of the leases
6 themselves. But this is a letter from NAC to Kmart that
7 says -- and this is describing the sandwich lease: "By
8 double assignment of lease from Nineteenth Asheville Corp.
9 to Asheville KM and from Asheville KM to Nineteenth
10 Asheville Corp., we arrive at the same landlord as
11 heretofore and all correspondences, notices and rent
12 payments will continue to be forwarded as follows."

13 So I think that makes clear that the assignment --
14 that there is associated with the sandwich lease a double
15 assignment by which the landlord interest, the interest as
16 assignee of the fee owner, as landlord, is still with NAP.
17 And I think -- again, so the sandwich lease itself -- so
18 that's tab 15 -- can't be read alone. There are three other
19 -- there are three assignments that go along with it. So
20 there's an assignment of -- so NAC assigns to Asheville KM
21 the ground lease, an assignment. That's in tab 11 in your
22 binder. And then NAC assigns the Kmart lease along with
23 three others to Asheville KM. That's tab 12. And then in
24 tab 14, you have Asheville KM assigning back to NAP the
25 Kmart lease. So NAC remains the assignee as landlord under

1 the Kmart lease beyond 1975.

2 THE COURT: Where's the assignment back? Which
3 document?

4 MR. LEVANDER: It's tab 14, Your Honor.

5 (Pause)

6 MR. LEVANDER: And there's a reference --

7 THE COURT: This assumes all of the obligations of
8 the landlord thereunder. Right? NAC assumes all the
9 obligations of the landlord thereunder, in tab 14, which
10 would include the obligation to provide the renewal?

11 MR. LEVANDER: To provide --

12 THE COURT: It's an absolute assignment, in other
13 words, of the lease.

14 MR. LEVANDER: Of the Kmart lease.

15 THE COURT: Yeah. An absolute assignment of the
16 Kmart lease. Right, that's what it is. Is there any
17 dispute that tab 14 is an absolute assignment of the Kmart
18 lease and the assumption by the assignee of all the
19 obligations of the landlord thereunder?

20 MS. WILLIAMS: Is that directed at me? I'd like
21 to --

22 THE COURT: I said it generally to both of you.

23 MS. WILLIAMS: I'd like --

24 THE COURT: Is there any disagreement about that?

25 MS. WILLIAMS: Well yes -- well what I would say

1 about tab 14 is that it was entered into in connection -- at
2 the -- on the very same day and in connection with the
3 sandwich lease. And again --

4 THE COURT: But it's an absolute -- I mean I'm
5 going back to the case law I cited originally where various
6 parties try to get out of obligations that they have because
7 they argue that they're not in privity with a landlord or an
8 assignor party who assigned to their direct privity party,
9 and the Carolina courts repeatedly say, going back to 1909
10 at least, that if there's been an as absolute assignment you
11 do have the privity and it's -- you're bound.

12 MS. WILLIAMS: And Your Honor, I'm going to --

13 THE COURT: Can I just say one more thing?

14 MS. WILLIAMS: Of course.

15 THE COURT: If it was less than that, if it was --
16 if the assignment of the lease was less than the full lease
17 wouldn't there have been an obligation to notify Kmart and
18 Kmart would have had rights under its lease at that point
19 because it would have been effecting its rights and who it
20 dealt with, who it paid rent to, who had the right to call a
21 default and all of those things? Which is why they probably
22 sent the notice in tab 16.

23 MS. WILLIAMS: Well --

24 THE COURT: It -- this is -- I mean you're talking
25 about changing fundamental rights with respect to a contract

1 that's already in existence, and I just -- I think that's
2 why the courts adopt this policy.

3 MS. WILLIAMS: And Your Honor, my counter to that
4 would be that Transform is talking about altering the
5 fundamental property rights of the fee simple owner --

6 THE COURT: All right. But that's --

7 MS. WILLIAMS: If I could --

8 THE COURT: -- only assuming that I'm wrong, but
9 you haven't answered my question as to why I'm wrong on that
10 point.

11 MS. WILLIAMS: Right. Well I have -- I want to
12 make two points.

13 THE COURT: Okay.

14 MS. WILLIAMS: First is just specific to this
15 lease. I'm not aware of anything in the Kmart lease that
16 would require it -- that would entitle it to get notice of
17 any of these transactions with respect to the ground lease.

18 But my point about this assignment at tab -- at
19 Joint Exhibit 14 is that it's executed on the same day as
20 the sandwich lease, and why on earth would they even have a
21 sandwich lease if they're going to turn around and ignore it
22 and say that this assignment authorizes NAC and its
23 successors to do as it pleases with the subleases when the
24 sandwich lease is very clear, don't modify it without our
25 consent?

1 THE COURT: Well first of all when you say don't
2 modify the lease already has the renewal provisions in it,
3 right?

4 MS. WILLIAMS: Not in 1975 --

5 THE COURT: Not in 1992.

6 MS. WILLIAMS: Yes.

7 THE COURT: Where it was the second amendment.

8 MS. WILLIAMS: Right.

9 THE COURT: I understand.

10 MS. WILLIAMS: Yep.

11 THE COURT: Where they increased the rent.

12 MS. WILLIAMS: And you know, I mean -- look, Your
13 Honor, our contention is that the '92 document effectively
14 operates as a brand new agreement between NAP and Kmart. It
15 changed the rent, it changed the dimensions, it changed the
16 terms, it put -- NAP agreed to do some things under it, and
17 so yes, we view that functionally speaking as a sublease, an
18 agreement between NAP and Kmart to which the fee owners at
19 the time were not a party, were not provided notice, and
20 there was never even recordation of it despite the fact that
21 it purports to extend the term out, which is very odd under
22 North Carolina law, I have to say the fact that nothing was
23 recorded.

24 I will say that the other thing that I wanted to
25 point out about the recorded assignments, the assignments of

1 the ground lease that were recorded in the public registry,
2 they all have the same granting and have and to hold
3 language that I pointed the Court to as being so important
4 under North Carolina law. They all say to have and to hold
5 from the date of the assigned to the rest of the years
6 mentioned in the indenture of the lease as amended.

7 So again, in my view that points to limiting the
8 rights of whoever the tenant is ground lease to the term of
9 the ground lease itself.

10 THE COURT: But aren't you just then assuming away
11 the case law on that absolute assignment?

12 MS. WILLIAMS: Your Honor, I think the case law on
13 the absolute assignments, I just don't see it applying in
14 the same way that the Court sees it, because those
15 assignments, as I'm remembering, and I might be
16 misremembering, they don't come in the context of a ground
17 lease that's limit to do a term of --

18 THE COURT: I'm sorry, go ahead.

19 MS. WILLIAMS: I mean I apologize if I'm
20 misremembering the facts there, but I don't think those
21 assignments come in the context of a ground lease that's
22 limited to a term of years and that has other limitations on
23 here's what you can do with it.

24 It -- I mean I agree that if I'm leasing an
25 apartment from you and the lease allows and it assign my

1 tenancy to Mr. Goodman, Mr. Goodman is then your tenant and
2 I'm out of it. But that's not this situation.

3 This situation is if you lease me the apartment
4 for a long period of time and you give me -- you say look,
5 you can do what you like with the apartment subject to these
6 conditions, but your ability to rent the apartment ends
7 absolutely in six months, I can't give Mr. Goodman more than
8 what comes to the end of my term, and that's what those --
9 the cases talking about what estate are you granting the
10 grantee? Whether it's -- we cite the Williams case, which
11 is a life tenant who grants an easement to a power company,
12 but the easement ends when the life tenant dies. The East
13 Town case is a more classic sublease situation. But the
14 concept of you can't give more than you have. And in this
15 context --

16 THE COURT: But I'm sorry, but if the -- if you
17 give him the whole lease then the lessor has the right to
18 operate under the lease.

19 MS. WILLIAMS: And under that reading of the
20 ground lease that would mean that the ground lease tenant
21 could operate the lease forever even when the ground lease
22 is over.

23 THE COURT: With that full assignment with no
24 reservations I think that's right.

25 MS. WILLIAMS: And that is --

1 THE COURT: If the extensions are granted as per
2 the lease.

3 MS. WILLIAMS: And that is -- per which lease?

4 THE COURT: The Kmart lease.

5 MS. WILLIAMS: So -- and to my mind that is
6 utterly inconsistent with the granting and the have and to
7 hold, and that is where those older cases would say the have
8 and to hold limitations trump, if you will, the assignment
9 language.

10 THE COURT: Okay. Well --

11 MS. WILLIAMS: I think that I have -- the Court
12 has been very patient with me to move through those
13 arguments. There are a few, assuming that the Court -- I'll
14 make one more pitch for my sandwich lease argument, Your
15 Honor.

16 I don't see how you can violate the sandwich lease
17 and bind the fee owner, but I would -- there are a couple of
18 other aspects of 365 that I need to just get on the record
19 if I can.

20 THE COURT: Okay.

21 MS. WILLIAMS: The adequate assurance of future
22 performance, I think we've mentioned to the Court that we
23 have three clients in this case and we had asked for
24 information about the adequate assurance package. It was
25 provided to us. We have a client -- and I understand where

1 the Court has ruled on this before -- who -- we've got a
2 couple of issues with the package.

3 First we've asked Transform to identify who the
4 ultimate tenant is going to be. We all understand the store
5 has been dark since January. Transform isn't going to run a
6 store there. We don't know who our tenant is going to be,
7 and we don't -- we contend that you can't have adequate
8 assurance of future performance if you don't know who's
9 going to be in the space. Having a dark --

10 THE COURT: Well I could understand that to the
11 extent that not financial performance I guess but other
12 types of covenants. Is that what you're focusing on? I
13 mean if Transform is on the hook of the Transform entity
14 then it's not financial performance you're talking about?

15 MS. WILLIAMS: It's both, Your Honor. In part
16 because -- we'll talk about Transform in this --

17 THE COURT: Well let me put it differently. Why
18 would you care about the financial wherewithal of the
19 prospective tenant if that's just an add-on to Transform's
20 own ability to make the payments?

21 MS. WILLIAMS: The concerns that we have about
22 Transform's ability to make the payments is that we haven't
23 gotten any updated financial information. They're
24 continuing to send out that same one-page balance sheet that
25 we've represented other landlords that we've seen for

1 several months now, and it seems as if there must be some
2 2019 operating information, and we don't know how they're
3 doing.

4 THE COURT: Okay. I understand that.

5 MS. WILLIAMS: Second, the guarantee that's --

6 THE COURT: I thought you were going in a
7 different direction, which is we need to see the financials
8 of the new -- you know, the ultimate new tenant, which I
9 think is a different -- but I understand that, your update
10 point.

11 MS. WILLIAMS: Yes. And the guarantee that we've
12 been shown does not require the guarantor to pay the
13 landlord's reasonable attorneys' fees, which is a standard
14 provision in lease guarantees, and they could make it very
15 expensive if they wanted to to make us chase them if either
16 there is no tenant ever or the ultimate tenant defaults.
17 And it also requires us to come to New York, which we don't
18 think is appropriate for a North Carolina lease guarantee.

19 With respect to not knowing who this tenant is
20 going to be, we do have some concerns about non-monetary
21 issues, and this leads a little bit into cure rights, Your
22 Honor.

23 The space has been dark since January, the client
24 has been getting calls and threats -- or citations from the
25 fire marshal in Buncombe County. It took a great deal of

1 effort to find someone at Kmart who I think has been dealing
2 with the fire marshal, but we haven't been able to get into
3 the space to see what's going on with it.

4 We've had experience with Kmart in other stores,
5 in fact in Asheville where it turns out all of the HVAC
6 units were leaking gas and Kmart never --

7 MR. BAREFOOT: Your Honor, I'm just going to
8 object. Is counsel testifying? This is factual issues
9 about another lease that we've never heard before. I just
10 don't think it's appropriate from a hearsay perspective.

11 THE COURT: So what are you looking for, you're
12 looking for reasonable access?

13 MS. WILLIAMS: So well we are for the record --

14 THE COURT: Don't you have that under the lease
15 already?

16 MS. WILLIAMS: We tried to get in when the fire
17 marshal was threatening --

18 THE COURT: No, I'm sorry, reasonable access from
19 Transform, the lease that's being assigned.

20 MS. WILLIAMS: If we do then they're not following
21 the lease, because we asked for access and we were denied.

22 THE COURT: Okay. All right.

23 MS. WILLIAMS: The -- Your Honor, what I'm doing
24 for the record is I'm objecting to the adequate assurance
25 that we've been given for the reasons that I've stated.

1 THE COURT: All right. So it would be a
2 reasonable update and reasonable access to determine, you
3 know, deteriorating conditions, fire safety, et cetera?

4 MS. WILLIAMS: Some assurance that whoever the
5 tenant is going to be is going to upkeep the space and not
6 have --

7 THE COURT: Okay.

8 MS. WILLIAMS: -- a dangerous situation or get us
9 in trouble with the fire marshal.

10 THE COURT: Well although --

11 MS. WILLIAMS: And --

12 THE COURT: -- they have a guarantee, I'm assuming
13 that that's pretty reasonable assurance.

14 MS. WILLIAMS: Well I mean the provision of the
15 guarantee really, as someone who enforces guarantees all the
16 time, if you're going to make it expensive for your landlord
17 to chase you --

18 THE COURT: I understand that.

19 MS. WILLIAMS: Okay.

20 THE COURT: I understand that.

21 MS. WILLIAMS: And the North Carolina rather than
22 New York point.

23 I think we're reserving our rights on cure amount.

24 MR. BAREFOOT: Your Honor, that's consistent with
25 the order that we've proposed and the order that you've

1 entered.

2 THE COURT: Okay.

3 MR. BAREFOOT: All of their rights are reserves
4 and we will escrow the undisputed -- the disputed amounts.

5 THE COURT: All right. Although I couldn't tell
6 from the objection whether the only cure issue was the money
7 that -- the two checks that weren't cashed. Is there other
8 cure?

9 MS. WILLIAMS: Well --

10 THE COURT: It may be because you don't know the
11 interior of the --

12 MS. WILLIAMS: We --

13 THE COURT: -- you haven't been inside to know if
14 there's something that's happened --

15 MS. WILLIAMS: Yeah -- well yes --

16 THE COURT: -- to the property?

17 MS. WILLIAMS: -- Your Honor, there's -- very
18 briefly. There's three issues, we can work this out later.
19 But the checks that have been sent are made out incorrectly
20 so they can't be cashed any way.

21 THE COURT: Okay.

22 MS. WILLIAMS: And we need to get our client
23 directly in touch with someone so that they don't continue
24 to run up attorneys' fees on this. It's very expensive for
25 them to have to come through us for every issue.

1 This is a triple net lease, we don't know whether
2 Kmart has paid the property taxes. Presumably we can work
3 all that out to make sure that we're not going to be left
4 with property taxes not paid.

5 THE COURT: Okay.

6 MR. BAREFOOT: Your Honor, I can represent all of
7 those issues rights are fully reserved --

8 THE COURT: Okay.

9 MR. BAREFOOT: -- on both sides --

10 THE COURT: All right.

11 MS. WILLIAMS: Okay.

12 MR. BAREFOOT: -- and consistent with all the
13 other leases we'll duly reconcile them.

14 THE COURT: That's fine.

15 MS. WILLIAMS: And the -- well we've talked about
16 the fact that we can't get in so we don't no whether there's
17 other problems.

18 THE COURT: Okay. So do you want to just respond
19 on that -- on those points on the issues with the guarantee,
20 whether you're prepared to provide some information on a
21 prospective tenant and access -- reasonable access?

22 MR. BAREFOOT: Yes, Your Honor. For the record
23 Luke Barefoot from Cleary Gottlieb.

24 Your Honor, on the points on amendments to the
25 guarantee this is the first time we've heard those requests,

1 they all seem perfectly reasonable, and subject to
2 documentation I'm happy to make those amendments to the
3 guarantee.

4 THE COURT: Okay. All right.

5 MR. BAREFOOT: On the issue of adequate assurance,
6 candidly, Your Honor, this is really untimely.

7 We've exchanged discovery, we've had depositions,
8 at no point have there been any discovery requests, informal
9 or formal, for any updated add I can't tell assurance
10 information. This is I understand somewhat stale, but
11 that's by virtue of the adjournments that the parties have
12 requested to have this heard in this fashion.

13 I don't think it's appropriate to further adjourn
14 assignment of the lease.

15 THE COURT: Well has there been any material
16 adverse change?

17 MR. BAREFOOT: Not that I'm aware of, Your Honor.

18 THE COURT: Can that be represented?

19 MR. BAREFOOT: Not that I'm aware of, Your Honor.

20 THE COURT: Can that be represented by some
21 business person?

22 MR. BAREFOOT: Your Honor, I'd have to speak with
23 my client, but I really think the time for assignment of
24 this lease has come. They've put all their eggs in this
25 basket, and it's a little unfair at the hearing when this

1 was not subject to discovery at all to suddenly raise a new
2 issue and have a whack a mole that we're never going to just
3 get this lease assigned. Which I know is what they want to
4 avoid, but I think it's what we're entitled to.

5 The cure issues I can again represent we are fully
6 reserved on the rights there, and I will work with counsel
7 to put them in touch with a business person promptly. I
8 think those discussions have not been happening because we
9 haven't gotten through this threshold issue.

10 THE COURT: Okay. All right. Well you know what,
11 I -- this has been put off a couple of times and I certainly
12 didn't have a sense that there was an adequate assurance
13 issue on the financial end, so I agree with that point.

14 The other points you've represented what the
15 client is willing to do.

16 So do you have anything to say in response to any
17 of the other arguments on the asserted termination of the
18 lease?

19 MR. LEVANDER: I can brief and I can answer any
20 questions that Your Honor has.

21 THE COURT: Please stand up, yeah.

22 MR. LEVANDER: So just very quickly.

23 THE COURT: In California, they sit down. I don't
24 know if you're from California, but anyway --

25 MR. LEVANDER: Just very quickly, Your Honor. The

1 second amendment, at tab 23, it's very clear that that's in
2 NAP's capacity as it's assignees landlord, that's very clear
3 in the recitals to that document.

4 Responding to the point about the granting and
5 habendum clause. Those cases that are being cited from
6 North Carolina from before the 1960s there's generally some
7 kind of contrary provision. So there's a fee simple
8 interest and then there's a life estate in the body of the
9 document. There's nothing contrary here, those cases don't
10 identify --

11 THE COURT: Because the assignment is separate --

12 MR. LEVANDER: That's correct.

13 THE COURT: -- of the lease.

14 MR. LEVANDER: Exactly.

15 And then finally on the absolute assignment
16 question that Your Honor asked, yes, those are all absolute
17 assignments. The 1975 assignment from Asheville KM to NAP
18 is also an absolute assignment, just to make that clear for
19 the record.

20 THE COURT: Okay.

21 MR. LEVANDER: And if there are any questions, I'm
22 happy to answer them.

23 THE COURT: Okay. All right.

24 I have before me an objection by what has been
25 referred to as the Bruce Trusts, which is the -- which are

1 the fee simple owners of real property located at 1001
2 Patton Avenue in Asheville, North Carolina, to the
3 assumption and assignment under Section 365 of the
4 Bankruptcy Code of a lease of that property to Transform
5 Holdco, the buyer, or its designee, under the asset purchase
6 agreement that the Court has previously approved.

7 The lease in question was originally entered into
8 on December 18, 1964 between S.S. Kresge Company,
9 predecessor to Kmart, as tenant, and Patton Avenue
10 Development Corporation, PADC, as landlord for the lease of
11 the property and the store that PADC agreed to construct on
12 the property.

13 The lease was for a term of 20 years and gave the
14 tenant the right to extend for 3 more consecutive terms,
15 each having 5 years that would run through January therefore
16 31, 2001.

17 I have the exhibits pertaining to this lease
18 admitted into evidence, as well as certain other exhibits,
19 and the witness for the Bruce Trusts deposition designations
20 in evidence. They are Exhibits 1 through 45.

21 As far as the transaction documents are concerned,
22 they reflect a first amendment to the Kmart lease in
23 August 27, 1965, which made it clear that the lease would be
24 binding on the landlord, including its assignees as defined
25 in paragraph 1 thereof, and all subsequent amendments to the

1 lease also make it clear that it's binding on the parties,
2 including the landlord and their assignees or vendees.

3 In February 1966, PADC conveyed its interest in
4 the underlying real property to another entity called GK,
5 Inc. which then conveyed its interest to Martin and Silvia
6 Bruce. That same day the Bruces and Patton Plaza Associates
7 entered into an agreement that assigned Patton Plaza
8 Associates or PPA, all right, title, and interest of the
9 landlord in and to all leases now in effect covering the
10 demised premise, including the -- which included the Kmart
11 lease. See Section 1307 of that agreement. And gave PPA a
12 ground lease -- a 30-year ground lease with three renewal
13 terms of 23 years each on a 99-year maximum term with annual
14 rent from the Bruces.

15 In November of 1969, PPA assigned its interest in
16 the ground lease and assignment to Nineteenth Asheville
17 Corp. or NAC.

18 The important point though is with respect to the
19 1966 transaction. Whereas the landlord under the Kmart
20 lease and the fee owner of the property were the same when
21 the lease was first entered into in February 1966, the
22 landlord became different from the fee owner of the ground
23 lease of the -- the fee owner of the real property and the
24 landlord of the ground lease. However, at that time, and as
25 recognized in the transaction documents between PADC and --

1 I'm sorry -- between PPA and the Bruces, the Kmart lease was
2 absolutely assigned in full to PPA.

3 Since that time that lease has continued to be
4 assigned in full by its terms. It has now gone through a
5 number of such assignments, and importantly was amended in
6 March of 1992 by Kmart and the assignee of the Kmart lease
7 to extend the term of the lease, that is, the Kmart lease,
8 through with renewals 2032.

9 There was a third amendment also between NAP and
10 Kmart on May 23, 2017 that split the renewals into two
11 different periods, but the net effect is to extend it, if
12 the renewal options are exercised by the tenant, through
13 2032.

14 The fee title and status as landlord under the
15 ground lease and the ground tenant have also changed over
16 the years. The Bruce Trusts are currently the fee owners
17 and landlord is under the ground lease.

18 I believe it's acknowledged by both sides that the
19 ground lease itself has expired earlier this year.

20 The Bruce Trusts contend that, at a minimum,
21 because of the termination of the ground lease, there is no
22 Kmart lease to be assigned; that is, the Kmart lease is
23 subject to the ground lease as, in effect, a sublease under
24 the ground lease. And under well-established law, which I
25 don't believe Transform Holdco disputes, upon termination of

1 the head lease, which would here be the ground lease or the
2 main lease, which again would be the ground lease, a
3 sublease of that property would itself terminate since a
4 subtenant has no more rights than it obtains through its
5 landlord. And if its landlord's right to the property has
6 ended, the subtenancy would cease, subject to equitable
7 doctrines and the like.

8 The problem with this argument, however, is that
9 here the Kmart lease preceded the ground lease and the
10 transaction between PPA and the Bruces. The Kmart landlord
11 and the ground landlord, respectively, predecessor --
12 predecessors, excuse me.

13 Moreover, not only was the ground lease subject to
14 the Kmart lease but, as I noted earlier, the PPA Bruce
15 agreement provides for the complete assignment of the Kmart
16 lease to PPA, which then has continued to be completely
17 assigned throughout its existence.

18 Under those circumstances, under the laws of North
19 Carolina, which the parties agree applies here, privity of
20 the estate is created between the original lessor and
21 assignee. And therefore, I conclude that the parties to the
22 amendments to the Kmart lease, in fact, had the authority to
23 amend those documents as per the agreements between them,
24 which would have the effect of extending the term through,
25 if the renewals are exercised, 2032.

1 The assignment reserved no interest in the Kmart
2 lease and it never was therefore a sublease. The only
3 exception to that rule is if the assignor retained any
4 remaining interest in the lease, and I conclude based on the
5 documents between the parties that that was not the case.

6 As we went through during oral argument, the Bruce
7 Trusts have argued that various provisions of Article 13 of
8 the ground lease and assignment put restrictions on the
9 assignment and ability to modify the lease, that is the
10 Kmart lease, but I conclude that, as I said during oral
11 argument, the restrictions apply to true subleases or future
12 subleases of the Asheville premise and that, in fact, the
13 amendments to the lease are consistent with the permitted
14 changes under Section 1310 of the lease in that they
15 extended the term and did not decrease the rent payable. In
16 fact, the 1992 assignment materially increased the rent
17 payable. See, generally, Northside Station Associate
18 Partnership v. Maddry, M-A-D-D-R-Y, 105 N.C. App. 384, 413
19 S.E.2d 319 (N.C. Ct. App. 1992), Kmart Corp. v. Guastello,
20 2008 N.C. App. LEXIS 1005 at pages 9 through 10 -- I'm sorry
21 -- 9 through 12, N.C. App., as I said, May 20 of 2008. And
22 see, generally, although this doesn't deal with real
23 property leases but rather contract rights, Rose v. Vulcan
24 Materials Co., 282 N.C. 643, 194 S.E.2d 521, (Sup.Ct. N.C.
25 1973) at North Carolina Reporters 661 through 663.

1 To be contrasted with these facts is Neal v. Craig
2 Brown, Inc., 86 N.C. Ct. App. 157, 356 S.E.2d 912 (N.C. Ct.
3 App. 1987) at N.C. Ct. App. pages 162 through 163.

4 One can alternatively rule that given the absolute
5 assignments the landlords under the Kmart leases had actual
6 authority as well as apparent authority under North Carolina
7 law to enter into those agreements, that is the amendments
8 that extended the ultimate term of the lease through 2032.
9 See, generally, Hogue v. Cruise (ph), 812 S.E.2d (1915) and
10 Walker v. Sloan, 429 S.E.2d 236, 243 through 44, North
11 Carolina -- (N.C. App. 2000).

12 I say this notwithstanding the recordation of the
13 ground lease, given the terms of the ground lease, and the
14 assignment therein of the underlying Kmart lease. So I will
15 deny the objection.

16 As far as the other part of the objection
17 pertaining to -- I'm sorry -- I'll deny that portion of the
18 objection that's premised on the lease having terminated.

19 As far as the remaining portion of the objection,
20 the only part that has not been resolved on the record is
21 the request by the Bruce Trusts for additional financial
22 disclosure by Transform Holdco from that disclosure that had
23 previously been provided at this point a couple of months
24 ago. Given the length of time that this matter has been
25 pending, the discovery that's taken place, and the fact that

1 that request was made for the first time in oral argument
2 today, I believe it's too late.

3 The basis for objecting on grounds of adequate
4 assurance under Section 365 needs to lay out some rationale
5 where adequate assurance has already been offered, or a form
6 of adequate assurance has already been offered. If, in
7 fact, it had been made timely, the buyer of Transform Holdco
8 could have considered it, and consistent with what it has
9 done so far in this case, in all likelihood, it would have
10 provided some form of information to the Bruce Trusts. But
11 it's not in a position to do that today. Its client isn't
12 here, it hasn't considered the issue, and it's under a
13 deadline to move forward under 365(d)(4). So for all of
14 those rules I'll overrule that portion of the adequate
15 assurance objection.

16 So I think you're going to have to mark up the
17 order slightly to deal with the guarantee point and maybe
18 the access point, unless that's already in the lease, and
19 then you can email it to chambers. You don't need to
20 formally settle it on counsel for the Bruce Trusts, but you
21 should provide it to them before you send it into chambers.

22 MS. WILLIAMS: Your Honor, could I -- one
23 technical clarification? On the evidence that's before the
24 Court, there's also the declaration of Mr. Bruce, which is
25 4091, which was effectively his direct and then the depo was

1 the cross.

2 THE COURT: Well, I understood we were just going
3 with the depo though. Are we going with his declaration,
4 too?

5 MR. BAREFOOT: Your Honor, it was our
6 understanding that would be his direct testimony --

7 THE COURT: With?

8 MR. BAREFOOT: -- consistent -- his declaration --

9 THE COURT: His declaration.

10 MR. BAREFOOT: -- would be his direct testimony --

11 THE COURT: That's fine then.

12 MR. BAREFOOT: We have no objection to its --

13 THE COURT: I have no problem with that.

14 MR. BAREFOOT: -- admission.

15 MS. WILLIAMS: Thank you.

16 THE COURT: That's fine.

17 (Declaration of Mr. Bruce received in evidence)

18 MR. BAREFOOT: And Your Honor, we will work with
19 counsel on the name to submit a consensual order as soon as
20 possible, and in any event before the July 8th 365(d)(4)
21 deadline.

22 THE COURT: Okay.

23 MS. WILLIAMS: And I guess the only thing that --
24 the only other thing we wanted to say on the record, because
25 I'm not sure how the form orders have been working in this

1 case, but we're -- we want to preserve our right to
2 appeal --

3 THE COURT: Oh, yeah, that's --

4 MS. WILLIAMS: We're not --

5 THE COURT: You don't need to --

6 MS. WILLIAMS: We're not agreeing to the waiver of
7 the stay --

8 THE COURT: That's fine.

9 MS. WILLIAMS: -- the 14-day stay. Thank you,
10 Your Honor.

11 MR. BAREFOOT: Well, Your Honor, there just might
12 be a time issue there.

13 THE COURT: Well, as far as -- if you're going to
14 be relying on 365(d)(4), I will waive the stay to the extent
15 that it interferes with that. I mean --

16 MR. BAREFOOT: Or we'd be happy for them to grant
17 an additional extension --

18 THE COURT: Right. That's why I prefaced it by
19 saying if you're going to rely on 365(d)(4) as running.
20 Then clearly there's cause to waive the stay before it runs.

21 MS. WILLIAMS: And remind me, that deadline is
22 the --

23 MR. BAREFOOT: July 8th.

24 MS. WILLIAMS: -- 8th? I only have half of my
25 client here, Your Honor, so we'll connect on that, and --

1 THE COURT: All right. But in any event --

2 MS. WILLIAMS: -- if it becomes an issue --

3 THE COURT: -- I'll waive it --

4 MR. BAREFOOT: To the extent --

5 THE COURT: -- through July 7th, yeah, or to the
6 extent required, so it would run one day before -- even if
7 it's extended it would run one day before the expiration.

8 MR. BAREFOOT: Depending on when we can get the
9 order submitted, but --

10 THE COURT: Right.

11 MR. BAREFOOT: -- hopefully we'll work this out
12 and that won't be an issue, Your Honor.

13 THE COURT: Okay. Very well.

14 MR. BAREFOOT: That's the entirety of the agenda
15 for today, Your Honor.

16 THE COURT: Okay. Thank you.

17 MR. BAREFOOT: Thank you, Your Honor.

18 (Whereupon, these proceedings were concluded at 3:56
19 p.m.)

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I N D E X

R U L I N G S

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C E R T I F I C A T I O N

We, Lisa Beck and Dawn South, certify that the foregoing
transcript is a true and accurate record of the proceedings.

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